November 24, 2003

Honorable Ronald B. Mun
Corporation Counsel
City and County of Honolulu
Honolulu Hale, First Floor
Honolulu, Hawaii 96813

Dear Mr. Mun:

Re: Termination for Convenience Settlement Proposal and Contractual Claims Filed with the City by Oahu Transit Group Joint Venture

This is in reply to your letter to the Office of Information Practices ("OIP") requesting an advisory opinion concerning the above-referenced matter.

In your letter to the OIP, you requested the OIP to provide an advisory opinion concerning the public's right to inspect and copy the termination for convenience settlement proposal and claims for breach of contract, wrongful termination, and detrimental reliance filed with the City and County of Honolulu ("City") by Oahu Transit Group Joint Venture ("OTG"), pursuant to Special Provision Number 14.0 of the contract between the City and OTG for the Honolulu Rapid Transit Development Project.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), a termination for convenience settlement proposal ("termination claim") and claims filed against the City by OTG for breach of contract, wrongful termination, and detrimental reliance, must be made available for inspection and copying.

BRIEF ANSWER

Yes. For the reasons explained below it is our opinion that OTG's claim against the City does not contain confidential commercial and financial information that is protected from disclosure under section 92F-13(3), Hawaii Revised Statutes. Despite requests therefor, the OTG has failed to provide the City or the OIP with specific and direct evidence of how disclosure of the claim would likely result in substantial competitive harm. Furthermore, in our opinion, a contractor who submits a claim against the City for termination for convenience and other related contractual claims cannot reasonably expect that information supporting such claims will not be held to the light of public scrutiny. Section 92F-12(a)(3), Hawaii Revised Statutes, reflects the strong public interest in the disclosure of government purchasing information, and the role that it plays in governmental accountability.

In addition, there is no basis to believe that disclosure of the OTG's claim will result in the frustration of a legitimate "government" function. There is no indication that disclosure of the claim will raise the cost of government procurements, discourage contractors from filing claims against the government, or discourage contractors from competing for government contracts.

It is our opinion, therefore, that the City should promptly make OTG's claim available for public inspection and copying, unless OTG should first secure an order of a court of competent jurisdiction restraining the City from doing so.

FACTS

On or about November 1, 1990, the City issued a Request for Proposals ("RFP") for the design, supply, construction, operation, and maintenance of the Honolulu Rapid Transit Development Project ("Project"). The OTG's proposal was submitted by a joint venture comprised of OTG, Morrison Knudsen Corporation, AEG Westinghouse Transportation Systems, Inc., SCI Engineers & Constructors, Inc., and E.E. Black (hereinafter referred to collectively as "OTG"). On October 2, 1991, the OTG was issued a Notice of Award by the City. A contract for the Project ("Contract") between the City and OTG was executed on October 3, 1991.

By letter dated April 20, 1993, the City notified the OTG in writing that phase I of the Contract was being terminated for convenience, and that the City was exercising its option to not issue a notice to proceed with phases II and III of the Contract. Section 14.0(C) of the Special Provisions of the Contract provides:

> After receipt of a Notice of Termination, the Contractor shall submit to the Contracting Officer his termination claim, in the form and with certification prescribed by the Contracting Officer. The claim shall be submitted promptly, no later than 1 year from the effective date of the termination unless one or more extensions are granted by the Contracting Officer in writing, upon request by the Contractor made in writing within the 1-year period or within any authorized extension period . . . . Upon failure of the Contractor to submit its termination claim within the time allowed, the Contracting Officer may determine and disburse the amount, if any, due to the Contractor because of the termination.

By letter dated May 18, 1993 addressed to the City Director of Finance, the OTG notified the City that it was preparing a claim against the City under section 14.0(C) of the Special Provisions of the Contract. This letter also provided notice to the City of the OTG's claims for breach of contract and detrimental reliance, and stated that OTG was entitled to seek all of its unreimbursed costs relating to the project, including proposal preparation costs, together with profit on the costs incurred. Attached to its letter was an exhibit setting forth OTG's best estimate of the damages it had incurred as of the date of its letter.

By letter dated August 12, 1993 addressed to the City Director of Finance, the OTG submitted two (2) three-ring binders containing documents supporting its claims against the City for termination for convenience, breach of contract, improper termination, and detrimental reliance. Volume I sets forth the OTG's substantive bases for recovery, including legal analysis, with relevant documents establishing key facts relied upon. Volume II contains the supporting financial schedules summarizing the damages claimed by the OTG.

Volume I of the OTG's claim includes five sections and forty-six exhibits. Section I of Volume I is entitled "Introduction," section II is entitled "Statement of Facts," section III is entitled "Breach of Contract Claims," section IV is entitled "OTG's Termination for Convenience Settlement Proposal," and section V is entitled "Conclusion."

Volume II of the OTG's claim consists of three schedules. Schedule III.A is a detailed schedule of costs and expenses claimed by OTG associated with its Improper Termination/Breach of Contract claim, including costs and expenses incurred by OTG's joint venturers or subcontractors.

Schedule III.B consists of a detailed itemization of costs and expenses claimed by OTG in connection with its Detrimental Reliance claim against the City, including costs and expenses incurred by OTG's joint venturers or subcontractors.

Schedule IV consists of a detailed itemization of costs and expenses claimed by OTG in connection with its Termination for Convenience claim against the City, including costs and expenses incurred by OTG's joint venturers or subcontractors.

Each of the three schedules contains a detailed one-page table, and supporting schedules, describing costs claimed by the OTG in connection with the following expense categories:

1. Proposal Preparation Costs, including engineering, public relations, MK/Meyers proposal preparation costs;
2. Matra Lawsuit costs;
3. Performance Bond Fee;
4. Performance Bond Interest;
5. Public Relations Costs Phase 1;
6. Public Relations Cost Phase 1A;
7. Contract Closeout Costs;
8. Settlement Proposal Estimated Costs;
9. Phase 1 Costs;
10. Additional Phase 1A Costs;
11. Contract Balance & Retainage; and
12. Termination Subconsultant Costs.

By letter dated August 19, 1993, to the OTG, the Director of Transportation Services notified the OTG that its August 12, 1993 letter did not identify the information in its letter and

enclosures that the OTG believed to be confidential commercial and financial information, trade secrets, or personal information protected from disclosure under the UIPA. This letter requested the OTG to notify the City within seven (7) days of what information, if any, within its August 12, 1993 letter and enclosures the OTG believed to be protected from disclosure under the UIPA. By letter dated September 3, 1993, the OTG notified the City that it would respond within several weeks to the City's request that it identify which portions of its claim the OTG believed to be protected from disclosure under the UIPA. This letter also notified the City that in the interim, the City was not to assume that any information in the OTG's claim was subject to public disclosure without the OTG's consent.

In a letter dated October 11, 1993 to Joseph M. Magaldi, Jr., Director of Transportation Services for the City and County of Honolulu, a copy of which was provided to the OIP, the OTG asserted that portions of its claim against the City, which are summarized as follows, are exempt from disclosure under section 92F-14, Hawaii Revised Statutes:

1. Section II.E of the claim, pages 18-22 inclusive, which is a narrative relating to public relations efforts of OTG in connection with the Rapid Transit Development Project, and costs incurred by OTG incurred therewith;

2. Exhibits 30-32 of Volume I, which are consulting agreements between OTG and OTG consultants;

3. Exhibits 33-35 of Volume I which include certain agenda, minutes, and notes of meetings between the City, OTG, and Hawaii Taxpayers for Transit Solutions regarding public relations efforts connected with the project, a document entitled "The Plan: Rapid Transit Outreach," a plan intended to develop public support for the project and to influence the various City Council members' constituencies, and various other documents;

4. Section IV of the claim at pages 35-51 inclusive, which is a narrative and legal argument relating to OTG's purported termination for convenience claim, which includes total aggregate costs incurred by the OTG in connection with various aspects of the project, such as proposal

preparation costs, the defense of another bidder's lawsuit, performance bond costs, public relations costs, contract close-out costs, settlement proposal costs, etc.;

5. Exhibits 37-45 of Volume I, which consist of contracts, invoices, and various other documents relating to the subconsultant cost items in the OTG's three purported claims; and

6. Volume II of its claim in its entirety, which contains detailed summaries and tables of the costs claimed by OTG.

By letter to the OTG dated October 18, 1993, a copy of which is attached as Exhibit "A," the OIP notified the OTG that the information contained in its claim was not protected from disclosure under section 92F-14, Hawaii Revised Statutes, because the UIPA recognizes only the privacy interests of "natural persons." The OIP also requested the OTG to provide the OIP with:

> [A] written description of the items in your claim against the City that you believe are protected from disclosure as "confidential commercial and financial information," or as a "trade secret." Also, as to each item claimed to be confidential, please provide the OIP with a detailed, and non-conclusory statement explaining how disclosure of the information would likely result in substantial competitive injury, or how the information claimed to be confidential by OTG constitutes a "trade secret." Please provide a response to this request no later than October 30, 1993, otherwise we shall assume that the OTG's claim does not contain trade secrets or confidential commercial and financial information.

Letter to Anthony Daniels, Project Director, from OIP Staff Attorney Hugh R. Jones, dated October 18, 1994.

By letter dated October 21, 1993 to OTG, Joseph M. Magaldi, Jr., Director of Transportation Services, notified the OTG that:

> [T]he City asked that OTG provide the City, by October 18, 1993, an identification of the specific information that it deems to be potentially subject to exemption from disclosure under [the UIPA] and for a detailed explanation as to justification for such exemption. By letter dated October 18, 1993, the State Office of Information Practices also made a similar request to OTG. . . . It appears that OTG does not intend to comply with either the City's or the Office of Information Practices' request. If this is an accurate characterization of OTG's position, we request that OTG immediately notify both the City and the Office of Information Practices of this position.
>
> From OTG/CCH-0720 and the October 19, 1993 telephone conversation, it also appears that OTG has decided to ignore the City's clear warning that the City intends to release the bulk of OTG's letter dated August 12, 1993 and Volume I of the letter's two-volume enclosure unless OTG filed an action for injunctive relief by October 18, 1993. Not only does OTG have a clear obligation to justify any request for exemption from disclosure, OTG also has a clear obligation to take all steps necessary to protect its interests, if any. We must assume that the OTG's position constitutes a willful failure on the part of OTG, after due notice and opportunity, to protect its interests, if any, in maintaining the confidentiality of the specified information in OTG's purported claims document and a waiver of any and all claims against the City for the disclosure of such information.

Letter from Joseph M. Magaldi, Jr., Director of Transportation Services, to OTG, dated October 21, 1993.

By letter dated October 22, 1993 from Robert T. Takamatsu, attorney for the OTG, to Joseph M. Magaldi, Jr. and Gregory J. Swartz, Deputy Corporation Counsel, the OTG informed the City that Project Director Anthony Daniels' letter to the City dated

October 11, 1993 sets forth the OTG's position on this matter. A courtesy copy of this letter was provided to the OIP by the OTG. In response, the OIP notified the OTG that:

> The OIP does not construe the courtesy copy of your letter dated October 22, 1993 as a reply to our letter to Oahu Rapid Transit Group Joint Venture dated October 18, 1993. If your letter was intended to be a reply to our letter dated October 18, 1993, please contact me at 586-1404, so that we may avoid any misunderstanding in this matter.

Letter to Jeffrey N. Watanabe, Esq., attorney for OTG, from OIP Staff Attorney Hugh R. Jones, dated October 26, 1993.

In October 1993, Deputy Corporation Counsel Gregory J. Swartz provided the City Council with a "public release" version of the OTG's claim, pending the issuance of this opinion letter. This public release version was also made available for inspection by David Waite, a reporter with The Honolulu Advertiser. The public release version of the claim withheld Volume II of the OTG's claim in its entirety. In Volume I of the OTG's claim, the following information was segregated from the Public Release version of OTG's claim:

1. Pages 18-22 and 35-51 which consist of a narrative explanation of the OTG's claim and aggregate expenses by cost item;

2. All of Exhibits 33-35 which relate to public relations and outreach efforts connected with the project;

3. Exhibits 37-45, which reveal unit prices, labor rates, and other costs incurred by the OTG; and

4. A portion of Exhibits 3, 24, 25, 26, 27, and 29 which contained unit price information, multiplier percentages and rates, rates for performance bond calculations, and the amount paid by the OTG for its performance bond.

As of the date of this opinion, the OIP has not received any statement from the OTG concerning the portions of its claim that it believes contain confidential commercial and financial information, along with a detailed explanation of how disclosure of the claim would cause substantial competitive injury or result in the disclosure of a trade secret, despite a request therefor before October 30, 1993.

Former City Councilmember Arnold Morgado, Jr., The Honolulu Advertiser, and other members of the public have requested to inspect and copy the claim filed by the OTG against the City. In response to these requests, your office requested the OIP to provide you with an advisory opinion concerning the City's obligation to make the OTG's claim available for inspection and copying under the UIPA. Your office also provided the OIP with a copy of the OTG's termination for convenience and contractual claims and related correspondence for our in camera review.

DISCUSSION

I. INTRODUCTION

The UIPA provides that "[e]xcept as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours." Haw. Rev. Stat. § 92F-11(b) (Supp. 1992). Under the UIPA, the term "government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1992).

Under the UIPA, it is the agency's burden to establish that a requested government record is protected from disclosure under one of the exceptions in section 92F-13, Hawaii Revised Statutes. See Haw. Rev. Stat. §§ 92F-11(b) and 92F-15(c) (Supp. 1992). Likewise, where a requested government record contains both "public" and confidential information, an agency must disclose all reasonably segregable disclosable information. See, e.g., Haw. Rev. Stat. § 92F-42(13) (Supp. 1992).

In addition, in section 92F-12, Hawaii Revised Statutes, the Legislature set forth a list of government records, or information set forth therein, that must be made available for public inspection and copying "any provisions to the contrary

notwithstanding." With respect to the list of records set forth in section 92F-12, Hawaii Revised Statutes, the UIPA's legislative history provides:

> In addition, however, the bill will provide in Section -12 a list of records (or categories of records) which the Legislature declares, as a matter of public policy, shall be disclosed. As to these records, the exceptions such as for personal privacy and for frustration of legitimate government function are inapplicable. This list should not be misconstrued to be an exhaustive list of the records which will be disclosed . . . [t]his list merely addresses some particular cases by unambiguously requiring disclosure.

S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H.R. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988) (emphases added).

Of relevance to the issue presented, section 92F-12(a)(3), Hawaii Revised Statutes, provides that any provision to the contrary notwithstanding, each agency shall make available for public inspection and copying "[g]overnment purchasing information, including all bid results, except to the extent prohibited by section 92F-13." Haw. Rev. Stat. § 92F-12(a)(3) (Supp. 1992).[1]

[1]We have previously noted that section 92F-12(a)(3), Hawaii Revised Statutes, was included in the UIPA largely as a result of the recommendations set forth in Vol. I of the Report of the Governor's Committee on Public Records and Privacy (1987). With respect to government purchasing information, this report states:

> Also raised was the availability of **government spending information**. The basic thrust is that anytime taxpayer money is spent, the taxpayers have a right to see how it was spent. See Joseph Bazemore, Hawaii Building and Construction Trades Council, AFL-CIO (II at 199 and I(H) at 35-37). See also Kelly Aver (I(H) at 2), who felt that such information should be available to monitor abuse. To some degree, this is

In our opinion, the information contained within the OTG's claim filed with the City constitutes "government purchasing information," as the information in this government record clearly relates to the contract awarded to OTG by the City that was terminated for convenience. In reviewing the exceptions in section 92F-13, Hawaii Revised Statutes, only one of the exceptions to disclosure would arguably permit the City to withhold access to the OTG's claim. We now turn to an examination of this exception.

II. GOVERNMENT RECORDS THAT MUST REMAIN CONFIDENTIAL IN ORDER TO AVOID THE FRUSTRATION OF A LEGITIMATE GOVERNMENT FUNCTION

Under section 92F-13(3), Hawaii Revised Statutes, an agency is not required to disclose "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." As we have previously noted in several opinion letters, in Senate Standing Committee Report No. 2580, dated March 31, 1988, the Legislature provided examples of information that may be withheld by an agency to avoid the frustration of a legitimate government function, including:

> (3) Information which, if disclosed, would raise the cost of government

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> covered by issues discussed above under government employees, public works, and bid results. There is also, however, a desire to ensure that all **State and county purchasing information** is available. See James Wallace (I(H) at 16-17). As a Committee member put it: "Government should never stop short of complete openness in this area." If for no other reason, taxpayers need the assurance of knowing that this information is accessible. Moreover, it is unlikely that this information should be much of a concern and vendors who do business with the State should not have an expectation of privacy as to that sale.

Vol. I Report of the Governor's Committee on Public Records and Privacy at 114 (1987) (emphases in original).

> procurements or give a manifestly unfair advantage to any person proposing to enter into a contract or agreement with an agency, including information pertaining to collective bargaining;
>
> (4) Information identifying or pertaining to real property under consideration for future public acquisition, unless otherwise available under State law;
>
> . . . .
>
> (6) Propriety information, such as research methods, records and data, computer programs and software and other types of information manufactured or marketed by persons under exclusive legal right, owned by an agency or entrusted to it;
>
> (7) Trade secrets or confidential commercial and financial information; . . . .

S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988).

We do not believe that disclosure of the information contained within the OTG's claim would raise the cost of government procurements, disclose information concerning real property under consideration for future public acquisition, or disclose information manufactured or marketed under exclusive legal right. Nor do we believe that the information contained within OTG's claim constitutes a "trade secret."

When determining whether information constitutes "confidential commercial and financial information," we have previously found guidance in interpreting this term from federal case law applying Exemption 4[2] of the federal Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). See, e.g., OIP Op. Ltr. No. 90-3 (Jan. 18, 1990); OIP Op. Ltr. No. 91-14 (Aug. 28, 1991); OIP Op. Ltr. No. 93-1 at 10 (April 8, 1993). As we

[2]Under Exemption 4 of the FOIA, a federal agency is not required to disclose "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4) (1988).

discussed in these advisory opinions, the federal courts have found that commercial and financial information is "confidential" if its disclosure would likely: (1) impair the government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974) ("National Parks I").

In National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 672 (D.C. Cir. 1976) ("National Parks II"), the Court of Appeals for the District of Columbia upheld the district court's decision finding that substantial competitive harm would likely occur to a park's concessioner by the government's disclosure of that concessioner's balance sheet setting forth the following information:

> [D]iscrete information as to each concessioner's cash in banks and on hand, marketable securities and investments, notes and accounts receivable, prepaid expenses, fixed assets, and accumulated depreciation . . . notes and accounts payable, mortgages and long-term liabilities, accrued liabilities, ...

National Parks II, 547 F.2d at 676, n.9.

We now turn to an examination of the two prongs of the National Parks test to determine whether commercial and financial information is "confidential."

A. **Impairment Prong of National Parks Test**

Protection under the "impairment prong" of the National Parks test traditionally had been denied when it was determined that the information in question was not submitted voluntarily, or where it is a required submission. See, e.g., Buffalo Evening News, Inc. v. SBA, 666 F. Supp. 467, 471 (W.D.N.Y. 1987) (no impairment because it is unlikely that borrowers would decline benefits associated with obtaining loans simply because status of loan was released); Daniels Mfg. Corp. v. DOD, No. 585-921, slip op at 6 (M.D. Fla. June 3, 1986) (no impairment when submission is "virtually mandatory" if supplier wished to do business with the government); Badhwar v. United States Dep't of the Air Force, 622 F. Supp. 1364, 1377 (D.D.C. 1985) (same); Racal-Milgo Gov't

Sys. v. SBA, 559 F. Supp. 4, 6 (D.D.C. 1981) (no impairment because "[i]t is unlikely that companies will stop competing for Government contracts if the prices contracted for are disclosed").

Under section 14.0 of the Special Provisions of the City's Contract with the OTG, the OTG was required to submit its termination claim no later than one year from the effective date of termination. It is our opinion that disclosure of the OTG's termination claim filed with the City is not likely to impair the ability of the government to obtain similar information in the future, since the termination claim was a required submission and it is unlikely that the disclosure of claims filed against the City will stop other contractors from doing so in the future. Accordingly, we now turn to an examination of whether disclosure of OTG's termination claim is likely to result in substantial competitive harm.

B. Competitive Harm Prong of National Parks Test

Conclusory allegations that competitive harm would result from the disclosure of commercial and financial information are unacceptable for purposes of determining whether information is protected from disclosure under FOIA's Exemption 4:

> Conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA, since such allegations necessarily elude the beneficial scrutiny of adversary proceedings . . . and generally frustrate the fair assertion of rights under the Act.

National Parks, 547 F.2d 673, at 680.

As a result, in Teich v. Food and Drug Administration, 751 F. Supp. 243 (D.D.C. 1990), a reverse FOIA suit, the court rejected Dow Corning Corporation's contention that the disclosure of animal studies about silicone breast implants would result in competitive harm, because Dow Corning failed to sustain its claim of competitive injury with "specific and direct evidence."

Both the City and the OIP have written to the OTG requesting the OTG to provide a detailed explanation of how disclosure of certain information contained in its termination claim would result in substantial competitive harm. See Letter from Hugh R.

Jones, OIP Staff Attorney, to Anthony Daniels, Project Director, dated October 18, 1994; Letter from Joseph M. Magaldi, Jr., Director of Transportation Services, to OTG, dated October 15, 1993. In response to these letters, OTG merely asserted in conclusory terms that the information was confidential. See Letter from Anthony Daniels, Project Director, to Joseph M. Magaldi, Jr., Director of Transportation Services, dated October 11, 1993; Letter from Robert T. Takamatsu, attorney for OTG, to Joseph M. Magaldi, Jr., Director of Transportation Services, dated October 22, 1993. The OTG's responses to the inquiries of the City and OIP, in our opinion, fail to provide specific and direct evidence of competitive harm, and fail to provide a basis for "beneficial scrutiny" of its allegations, thereby frustrating a fair assertion of the public's rights under the UIPA.

We also note that the federal courts have rejected reverse FOIA suits by the submitters of commercial and financial information, where the agency "repeatedly solicited and welcomed" the submitters' views on the applicability of a FOIA exemption, and the record demonstrated that the agency's action was not arbitrary and capricious. General Dynamics Corp. v. United States Dep't of the Air Force, 822 F. Supp. 804, 807 (D.D.C. 1992). The record here demonstrates that the City repeatedly requested the OTG to justify its assertion that information in its termination claim constitutes "confidential" commercial and financial information, only to receive conclusory statements from OTG in return. We do not believe that a decision by the City to disclose the OTG termination claim would be arbitrary and capricious under these facts.

Furthermore, much of the information contained in pages 18-22 of Volume I and Exhibits 33-35 of Volume I do not contain an exhaustive cataloging of the OTG's costs, but instead set forth a narrative description of the OTG's public relations efforts, and the minutes, notes, and agendas of meetings between the City, OTG, and Honolulu Taxpayers for Transit Solutions relating to public relations efforts connected with the Project. We do not believe that the Legislature intended the phrase "confidential commercial and financial information" to be so broadly construed as to encompass these categories of information. This can hardly be described as an exhaustive cataloging of a business organization's financial information, that was found confidential in National Parks II. Nor do any other of the exceptions to disclosure found in section 92F-13, Hawaii Revised Statutes, apply to this information.

In previous opinion letters, we have observed that the federal courts have found that the "disclosure of prices charged the Government is a cost of doing business with the Government." Racal-Milgo Gov't Sys. v. SBA, 559 F. Supp. 4, 6 (D.D.C. 1981); General Dynamics Corp. v. U.S. Dep't of the Air Force, 822 F. Supp. 804 (D.D.C. 1992) (same). See also EHE Nat'l Health Serv., Inc. v. HHS, No. 81-1087, slip op. at 4 (D.D.C. Feb. 24, 1984) ("[O]ne who would do business with the government must expect that more of his offer is more likely to become known to others than in the case of a purely private agreement"); AT&T Info. Sys. v. GSA, 627 F. Supp. 1396, 1403 (D.D.C. 1986) ("strong public interest" in release of component and aggregate prices in government contract awards).

We believe that companies that submit detailed commercial and financial information to governmental regulatory authorities, or in connection with government loan programs, rate or tariff increase requests or agency licensing functions, generally speaking, may reasonably expect that such detailed data will remain confidential. However, just as a contractor cannot reasonably expect that the unit prices charged the government will remain confidential, so too, we believe that a contractor submitting a termination claim to a government agency cannot reasonably expect that the details of that claim will not be held to the light of public scrutiny. Section 92F-12(a)(3), Hawaii Revised Statutes, reflects the strong public interest in the disclosure of government purchasing information, and the role that it plays in promoting governmental accountability[3].

Very importantly, section 92F-13(3), Hawaii Revised Statutes, exists to prevent the frustration of a government function. The City has not asserted to the OIP that disclosure of OTG's claim would frustrate some governmental function. Rather, the City has only expressed concern over possible liability for wrongful disclosure of OTG's claim information and, thus, requested an advisory opinion from this office.

Because the OTG has failed to supply the City or the OIP with any meaningful evidence that disclosure of its termination claim, or portions thereof, would result in substantial competitive harm, and because we believe that a contractor who

[3]With respect to the necessity for governmental accountability in the expenditure of public funds, see also Haw. Rev. Stat. sec. 92F-12(a)(8),(9),(10),14) (Supp. 1992).

submits a termination claim to a governmental agency cannot reasonably expect that the details of its claim will not be subject to the disinfecting light of public scrutiny, we do not believe that any portion of the OTG's termination claim or other contractual claims is protected from disclosure under section 92F-13(3), Hawaii Revised Statutes, or any other UIPA exception.

The City previously informed the OTG to obtain injunctive relief, by October 18, 1993, and it declined to do so. In our opinion, the City should promptly make OTG's claim available for public inspection and copying unless it is first restrained from doing so by a court of competent jurisdiction.

CONCLUSION

For the reasons set forth above, we conclude that the OTG's termination and other contractual claims filed with the City are not protected from required public disclosure under the UIPA, and that the City should promptly make the claims available for public inspection and copying, unless it is first restrained from doing so by a court of competent jurisdiction.

Please contact me at 586-1404 if you should have any questions regarding this opinion.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

HRJ:si
Attachment
c: Honorable John Waihee
Honorable Jeremy Harris
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